

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

OMAR HERNANDEZ,
Plaintiff,
vs.
GREG COX et al.,
Defendants.

2:13-cv-00698-RCJ-VCF

ORDER

16 Plaintiff Omar Hernandez, a prisoner in the custody of the Nevada Department of
17 Corrections, has lodged a Complaint pursuant to 42 U.S.C. § 1983, attached to his Application to
18 Proceed *in Forma Pauperis*. The Court grants the Application and dismisses the Complaint pursuant
19 to 28 U.S.C. § 1915A, with leave to amend.

I. **LEGAL STANDARDS**

A. Screening

22 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
23 redress from a governmental entity, officer, or employee. *See* 28 U.S.C. § 1915A(a). In its review, a
24 court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to
25 state a claim upon which relief may be granted, or seek monetary relief from a defendant who is
26 immune from such relief. *See id.* § 1915A(b)(1)–(2). Dismissal of a complaint for failure to state a

1 claim upon which relief can be granted is provided for by Federal Rule of Civil Procedure 12(b)(6),
 2 and the court applies the same standard under § 1915A. When a court dismisses a complaint for
 3 failure to state a claim, the plaintiff should be given leave to amend the complaint with directions as
 4 to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could
 5 not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

6 A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v.*
 7 *Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss
 8 under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint
 9 does not give the defendant fair notice of a legally cognizable claim and the grounds upon which it
 10 rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether a complaint
 11 is sufficient to state a claim, a court takes all material allegations as true and construe them in the
 12 light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.
 13 1986). A court, however, is not required to accept as true unwarranted deductions of fact or
 14 unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).
 15 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff
 16 must plead facts pertaining to his own case making a violation plausible, not just possible. *Ashcroft*
 17 *v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556) (“A claim has facial
 18 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 19 inference that the defendant is liable for the misconduct alleged.”). In other words, under the modern
 20 interpretation of Rule 8(a), a plaintiff must not only specify a cognizable legal theory (*Conley*
 21 review), he must also plead the facts of his own case so that the court can determine whether he has
 22 any basis for relief under the legal theory he has specified, assuming the facts are as he alleges
 23 (*Twombly-Iqbal* review).

24 “Generally, a district court may not consider any material beyond the pleadings in ruling on a
 25 Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint may
 26 be considered.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.

1 1990) (citation omitted). Similarly, “documents whose contents are alleged in a complaint and
 2 whose authenticity no party questions, but which are not physically attached to the pleading, may be
 3 considered in ruling on a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss
 4 into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under
 5 Federal Rule of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v.*
 6 *S. Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

7 Finally, all or part of a complaint filed by a prisoner may be dismissed *sua sponte* if the
 8 prisoner’s claims lack an arguable basis in law or in fact. This includes claims based on legal
 9 conclusions that are untenable, e.g., claims against defendants who are immune from suit or claims
 10 of infringement of a legal interest which clearly does not exist, as well as claims based on fanciful
 11 factual allegations, e.g., fantastic or delusional scenarios. See *Neitzke v. Williams*, 490 U.S. 319,
 12 327–28 (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

13 **B. Exhaustion**

14 “The Prison Litigation Reform Act requires that a prisoner exhaust available administrative
 15 remedies before bringing a federal action concerning prison conditions.” *Griffin v. Arpaio*, 557 F.3d
 16 1117, 1119 (9th Cir. 2009) (citing 42 U.S.C. § 1997e(a)). A prison system’s own requirements
 17 “define the boundaries of proper exhaustion.” *Jones v. Bock*, 549 U.S. 199, 218 (2007). The Nevada
 18 Department of Corrections utilizes a three-stage grievance procedure: an informal grievance, a first
 19 level grievance, and a second level grievance. See NDOC Admin. Reg. 740 (Inmate Grievance
 20 Procedure), available at <http://www.doc.nv.gov/sites/doc/files/pdf/AR740.pdf>.

21 Although once within the discretion of the district court, the exhaustion of administrative
 22 remedies is now mandatory. *Booth v. Churner*, 532 U.S. 731, 741 (2001). Those remedies “need not
 23 meet federal standards, nor must they be ‘plain, speedy, and effective.’” *Porter v. Nussle*, 534 U.S.
 24 516, 524 (2002) (citing *Booth*, 532 U.S. at 739–40 n.5). Even when the prisoner seeks remedies not
 25 available in administrative proceedings, notably money damages, exhaustion is still required prior to
 26 filing suit. *Booth*, 532 U.S. at 741. The Supreme Court has strictly construed section 1997e(a). *Id.* at

1 741 n.6 (“We will not read futility or other exceptions into statutory exhaustion requirements where
2 Congress has provided otherwise.”).

3 The failure to exhaust administrative remedies as required by § 1997e(a) is an affirmative
4 defense that a defendant bears the burden of proving. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Wyatt*
5 *v. Terhune*, 315 F.3d 1108, 1117 n.9 (9th Cir. 2003), *cert. denied*, 540 U.S. 810 (2003). However, if
6 the affirmative defense of non-exhaustion appears on the face of the complaint, a defendant need not
7 provide evidence showing non-exhaustion. *See Jones*, 549 U.S. at 215. Failure to exhaust is treated
8 as a matter in abatement, not going to the merits of the claim, and is properly raised in an
9 unenumerated Rule 12(b) motion. *Wyatt*, 315 F.3d at 1119. A court may look beyond the pleadings
10 and decide disputed issues of fact without converting the motion into one for summary judgment. *Id.*
11 “[I]f the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper
12 remedy is dismissal of the claim without prejudice.” *Id.* at 1119–20.

13 For the purposes of screening, the Court will assume all claims have been exhausted. The
14 Court will not more closely examine the issue unless some claims survive screening and Defendants
15 file motions alleging non-exhaustion of the surviving claims.

16 **II. ANALYSIS**

17 Plaintiff, a prisoner at High Desert State Prison, has alleged violations of his constitutional
18 rights while incarcerated at Southern Desert Correctional Center. He alleges that in July 2011,
19 Warden Williams placed Plaintiff in segregation due to suspicions that he was encouraging a “food
20 strike” among inmates. He was released the next day, and a food strike did occur, though Plaintiff
21 himself did not refuse to eat. He and two other inmates were returned to segregation, and he
22 received a notice of charges for a major violation. Senior Correctional Officer Walden denied
23 Plaintiff’s two requested witnesses for his disciplinary hearing. Sergeant Ron Jaeger conducted the
24 disciplinary hearing four hours after Plaintiff received the notice of charges, and he also denied
25 Plaintiff any witnesses. Investigator Harris apparently submitted a report for the hearing that
26 indicated Plaintiff’s guilt based upon “information received,” but the hearing record does not state

1 what that information was. Plaintiff was found guilty and sentenced to 168 days of disciplinary
 2 segregation and a disciplinary transfer. Assistant Warden Burson denied Plaintiff's grievances about
 3 the disciplinary proceedings. Although listed as three separate counts, Plaintiff in substance alleges
 4 a single violation of his Fourteenth Amendment due process rights.

5 To state a claim under § 1983, a plaintiff must allege: (1) that a right secured by the
 6 Constitution or laws of the United States was violated; and (2) that the alleged violation was
 7 committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).
 8 "Prisoners may . . . claim the protections of the Due Process Clause [and] may not be deprived of
 9 life, liberty, or property without due process of law." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).
 10 Still, because prisoners have already been convicted, "the full panoply of rights due a defendant in
 11 [criminal] proceedings does not apply. [Rather], there must be mutual accommodation between
 12 institutional needs and objectives and the provisions of the Constitution that are of general
 13 application." *Id.* (citations omitted). When a prisoner faces disciplinary charges, prison officials
 14 must provide the prisoner with: (1) a written statement at least twenty-four hours before the
 15 disciplinary hearing that includes the charges, a description of the evidence against the prisoner, and
 16 an explanation for the disciplinary action taken; (2) an opportunity to present documentary evidence
 17 and call witnesses, unless calling witnesses would interfere with institutional security; and (3) legal
 18 assistance where the charges are complex or the inmate is illiterate. *See id.* at 563–70.

19 However, no *Wolff*-type due process protections apply unless the result of the hearing is a
 20 punishment that impairs a constitutionally cognizable liberty interest as defined in *Sandin v. Connor*,
 21 515 U.S. 472 (1995). Under *Sandin*, segregation within prison does not in and of itself constitute a
 22 deprivation of a constitutionally cognizable liberty interest. *E.g., Luken v. Scott*, 71 F.3d 192, 193
 23 (5th Cir. 1997); *Rimmer-Bey v. Brown*, 62 F.3d 789, 790–91 (6th Cir. 1995). Although *Sandin*
 24 concerned administrative segregation, it applies with equal force to disciplinary segregation, because
 25 the State's motivation is not relevant to the antecedent inquiry: whether the result of the segregation
 26 deprives the prisoner of a constitutionally cognizable liberty interest. If the answer to that antecedent

1 question is “no,” then no procedures at all are constitutionally “due,” and a due process claim
2 necessarily fails. Just as a prison cannot avoid the strictures of the Due Process Clause simply by
3 labeling segregation as “protective” or “administrative,” a prisoner cannot invoke the Clause simply
4 by characterizing segregation as “disciplinary” or “punitive.” No matter how a prisoner’s
5 segregation (or other deprivation) is labeled by the prison or characterized by the prisoner, a court
6 must examine the substance of the alleged deprivation and determine whether it constitutes an
7 “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life”
8 before it determines whether *Wolff*-type procedural protections apply. *Sandin*, 515 U.S. at 484.

9 Showing that a deprivation is “atypical” with respect to the hardships of ordinary prison life
10 is difficult, because prison conditions are typically harsh. Prisoners are by definition segregated
11 from the public at large, and they are typically segregated even from other prisoners for the vast
12 majority of any given day, except for perhaps one other cell mate. Indeed, the Court of Appeals has
13 noted that “it would be difficult (we do not say impossible) to make disciplinary segregation
14 sufficiently more restrictive than the conditions of the general population . . . to count as an atypical
15 and significant deprivation of liberty[.]” *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003)
16 (Aldisert, J.) (quoting *Wagner v. Hanks*, 128 F.3d 1173, 1174 (7th Cir. 1997)) (alterations in
17 original). A court in this Circuit looks at three factors under *Sandin*: “(1) whether the conditions of
18 confinement mirrored those conditions imposed upon inmates in analogous discretionary
19 confinement settings, namely administrative segregation and protective custody[;] (2) the duration
20 and intensity of the conditions of confinement; and (3) whether the change in confinement would
21 inevitably affect the duration of [the prisoner’s] sentence.” See *Chappell v. Mandeville*, 706 F.3d
22 1052, 1064–65 (9th Cir. 2013) (second alteration in original; internal quotation marks omitted). In
23 other words, if the conditions in segregation are worse than those a prisoner will typically encounter
24 in prison, the Court must still consider whether the conditions are extreme enough in nature and
25 duration or whether they will necessarily affect the length of a prisoner’s sentence. Segregation may
26 lead to a cognizable deprivation of liberty, for example, if the conditions of segregation, although not

1 in themselves harsh enough to implicate a cognizable liberty interest, result in the deprivation of
2 some other interest particular to the aggrieved prisoner. *See Serrano*, 345 F.3d at 1074, 1078–79
3 (finding that segregation of a partially paralyzed plaintiff for almost three months to an area where he
4 could not use the wheelchair he was permitted in the general population, such that he could not
5 shower and had difficulty using the bathroom and the bed, implicated a cognizable liberty interest).

6 Plaintiff here alleges only the pure fact of segregation and its duration, not the conditions of
7 segregation or that it necessarily increased the length of his sentence. The Court therefore dismisses
8 the due process claim, with leave to amend. In order to invoke *Wolff*-type due process protections,
9 Plaintiff must allege facts indicating that the conditions he experienced in disciplinary segregation
10 were atypically harsh with respect to conditions in the general population and conditions the State
11 has discretion to impose, such as in administrative segregation or protective custody, or that his
12 segregation necessarily increased the length of his sentence.

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CONCLUSION

2 IT IS HEREBY ORDERED that the Application to Proceed in Forma Pauperis (ECF No. 1)
3 is GRANTED.

4 IT IS FURTHER ORDERED that the Clerk shall FILE the Complaint (ECF No. 1-1).

5 IT IS FURTHER ORDERED that the Complaint is DISMISSED, with leave to amend.

IT IS FURTHER ORDERED that Plaintiff shall have thirty (30) days from the date this Order is entered into the electronic docket to file an amended complaint. The amended complaint must be a complete document in and of itself and will supersede the original Complaint in its entirety. No allegations, parties, or requests for relief that are not presented in the amended complaint will be considered.

IT IS FURTHER ORDERED that Plaintiff shall place the words "FIRST AMENDED" immediately above "Civil Rights Complaint Pursuant to 42 U.S.C. § 1983" on page 1 in the caption, and Plaintiff shall place the case number "2:13-CV-00698-RCJ-VCF" above the words "FIRST AMENDED" in the space for "Case No."

IT IS FURTHER ORDERED that the Clerk shall send Plaintiff a blank section 1983 civil rights complaint form with instructions, along with one copy of the original Complaint.

17 IT IS SO ORDERED.

18 | Dated this 6th day of September, 2013.


ROBERT C. JONES
United States District Judge